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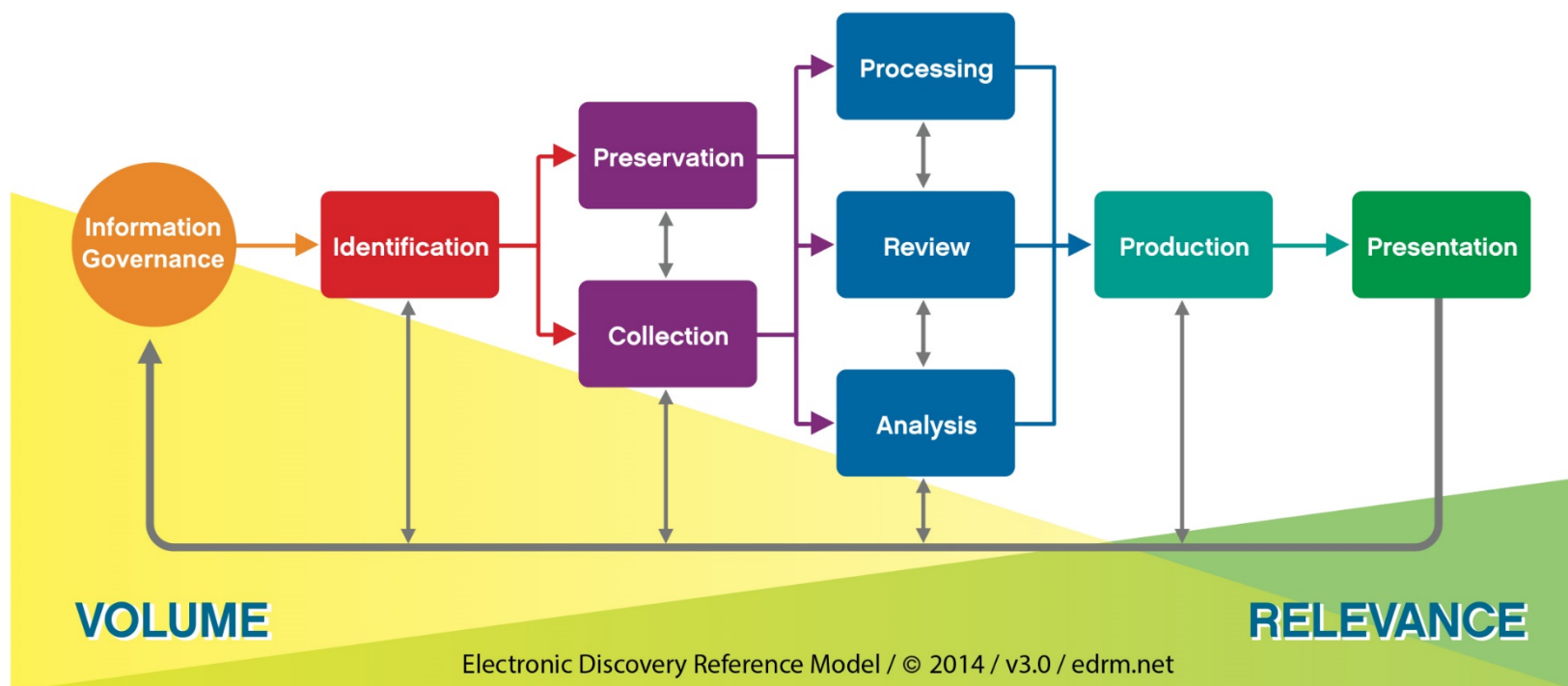
## DISCOVERY AND EVIDENCE: A PARALEGAL'S GUIDE OCTOBER 26, 2016

# Part I. FRCP and FRE Rules Changes: What Paralegals Need to Know

Sara Anne Hook, M.B.A., J.D.

# Helpful to Examine the Electronic Discovery Reference Model (EDRM)

## Electronic Discovery Reference Model



# Federal Rules of Civil Procedure: 2015 Amendments

- In December 2015, the Federal Rules of Civil Procedure were revised again, with particular attention paid to proportionality and the opportunity for sanctions.
- However, FRCP is interesting in that it requires everyone, not just lawyers, to cooperate in the litigation process.
- Other revisions should encourage cooperation between lawyers, including Rules 4(m), 16, 26(d)(2) and 34(b)(2)(a), which reduce the time periods for various activities to happen.

# The Five Most Important Things to Know About the 2015 Amendments

- As reported by Brown, the five things that are most important to know about the amendments are:
  - Proportionality in discovery is now part of the rules.
  - Much-needed improvements are made to Rule 34(b)(2) regarding responses to document requests.
  - Rule 37(e) has been completely rewritten to standardize sanctions for failure to preserve ESI.
  - Document requests can be served 22 days after the complaint and summons are served, before any party has answered.
  - Rule 26 expressly authorizes an option of shifting expenses as part of a protective order. [Geraldine Soat Brown, *The Top Five Things to Know About the New Federal Discovery Rules*, The Circuit Rider 10-13 (Nov. 2015).]

# Rule 1

- Rule 1 requires *parties*, as well as courts, to construe, administer, and employ the Rules in a manner "to secure the just, speedy, and inexpensive determination of every action and proceeding."
- The Advisory Committee on Rules of Civil Procedure ("Committee") notes that: "Effective advocacy is consistent with — and indeed depends upon — cooperative and proportional use of procedure." [Randy Wu, Summary of December 2015 Amendments to the Federal Rules of Civil Procedure, Orrick, December 7, 2015, <https://www.orrick.com/Events-and-Publications/Pages/Summary-of-December-2015-Amendments-to-the-Federal-Rules-of-Civil-Procedure.aspx>, accessed 9/14/16.]

## Rule 4(m): Reduced Time for Service

- As explained by Carson and Allison, “[u]nder Rule 4(m), the presumptive time to serve a defendant has been reduced from 120 days to 90 days.” [Derek Carson & Alix Allison, Federal Rules Update: December 2015, *The Federal Lawyer*, April 2016, 63-64, 67.] The authors go on to state that:
- The Advisory Committee Note explains that the driving force behind this change is the desire to reduce delay at the beginning of litigation. Further, Form 5 (Notice of Lawsuit and Request to Waive Service of Summons) and Form 6 (Waiver of the Service of Summons) have been incorporated into Rule 4 as a result of the abrogation of Rule 84. [*Id.* at 63.]

## Rule 16: Scheduling Order Changes

- As indicated by Secosky, Griset and McCray, '[c]hanges to Rule 16 will reduce delays at the beginning of litigation by limiting the time to issue the scheduling order to the earlier of either 90 days (not 120 days) after service or 60 days (not 90 days) after any defendant has appeared.
- Also, the scheduling order may include Federal Rule of Evidence 502 agreements, which further the Courts' encouragement of non-waiver and claw-back agreements to facilitate discovery. [John J. Secosky, Jill Crawley Griset & Anne Bentley McCray, E-Discovery Update: Federal Rules of Civil Procedure Amendments Go into Effect, Legal Alert (McGuireWoods), December 1, 2015, <https://www.mcguirewoods.com/Client-Resources/Alerts/2015/12/E-Discovery-Update.aspx>, accessed 9/14/16, *see also* Carson & Allison, *supra*.]



# Rule 26

- Some of the most significant changes to the FRCP occur in Rule 26 with respect to defining “proportionality, which have implications for identifying discovery issues early in litigation.
- As indicated by Secosky, Griset and McCray, FRCP Rule 26(b) has been reorganized to place new emphasis on relevance and proportionality of discovery.
- The new rule changes the scope standard from “any relevant subject matter involved in the action” and information “reasonably calculated to lead to the discovery of admissible evidence,” to information “**relevant to any party’s claim or defense and proportional to the needs of the case.**”

## Rule 26, cont.

- The proportionality factors have been relocated from Rule 26(b)(2)(C)(iii) to the front of the rule at FRCP Rule 26(b)(1) and include:
  - the importance of the issues at stake in the action;
  - the amount in controversy;
  - the parties' relative access to relevant information;
  - the parties' resources;
  - the importance of the discovery in resolving the issues; and
  - whether the burden or expense of the proposed discovery outweighs its likely benefit.
- These changes stress the parties' obligation to consider proportionality when propounding and responding to discovery and to focus on discovery of relevant information.

# Other Rules Impacted by Rule 26

- Proportionality concepts in FRCP Rule 26(b) make their way into other revised rules as well.
- Additional depositions are permitted with leave of court in Rules 30 and 31, but the court can consider proportionality factors from 26(b).
- FRCP Rule 33 still limits interrogatories to 25, and additional interrogatories are permitted only to the extent consistent with the relevance and proportionality concepts in Rule 26(b)(1) and (2).  
[Secosky, Griset & McCray, *see also* Carson & Allison, *supra*, at 64, *Fulton v. Livingston Fin., LLC*, No. C15-0574JLR, 2016 WL 3976558 (W.D. Wash. July 25, 2016) and *Lifeguard Licensing Corp. v. Kozak*, No. 15 Civ. 8459 (LGS)(JCF), 2016 WL 3144049 (S.D.N.Y. May 23, 2016).]

## Rule 26, cont.

- What effect the amendments to Rule 26 will have on the discovery process remains to be seen.
- Certainly the requirement that discovery must now be relevant to any party's claim or defense, as opposed to merely being reasonably calculated to lead to the discovery of admissible evidence, appears to be an attempt to limit fishing expeditions by requiring a more narrow focus.
- Whether this attempt is realized in practice, however, will only be determined after the courts have offered their interpretations on what, if any, practical distinction there is between the old language and the new. Chris Jones, Changes to Federal Rules of Civil Procedure Effective December 1, 2015, *Risk Manager*, July 24, 2015, <http://sandsandersonriskmanager.com/2015/07/24/changes-to-federal-rules-of-civil-procedure-effective-december-1-2015/>, accessed 9/14/16.]

# Rule 34

- Rule 34 has been revised in ways that encourage cooperation and reduce the opportunity for dilatory tactics:
- Rule 34: Boilerplate objections are prohibited and objections must "state *with specificity* the grounds for objecting" and "whether any responsive materials are being withheld."
- The Committee notes: "An objection may state that a request is overbroad, but . . . should state the scope that is not overbroad."
- An objection that "states the limits that have controlled the search for responsive and relevant materials"—which might include the date range or the scope of sources or search terms used—"qualifies as a statement that the materials have been 'withheld.'"
- Furthermore, this Rule includes a new provision that "[t]he production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response."
- This new provision appears to limit the parties' ability to engage in unconstrained rolling productions. [Wu, *supra*.]

# Rule 37

- The amendments have a clear focus on the preservation and discovery of electronic information.
- The duty to preserve this evidence arises as soon as litigation is reasonably anticipated, and Rule 37 vests courts with a large degree of discretion in how to cure the loss of information that has been accidentally or intentionally spoliated.
- Because of this, it is extremely important for every organization to have measures in place to quickly and accurately identify those events that could lead to litigation, and to preserve all electronic information related to those events. [Jones, *supra*.]

## Rule 37, cont.

- As explained by Secosky, Griset and McCray, “[c]hanges to Rule 37, pertaining to the preservation or loss of electronically-stored information, are also significant.
- First, Rule 37(e) adopts a common law principle that a duty to preserve arises when litigation is “reasonably anticipated.”
- Second, consequences for failing to preserve data are also better defined in the new Rules. Rule 37(e)(1) provides that the court, “upon finding **prejudice** to another party from loss of the information, may order measures **no greater than necessary to cure the prejudice.**” [Secosky, Griset & McCray, *supra*.]

## Rule 37, cont.

- Under the new Rule, more serious sanctions for loss of ESI are only appropriate where the court finds a party intended to deprive the other party's use of the ESI in litigation.
- Only upon a finding of intent can the court impose sanctions of an adverse inference jury instruction, dismissal of the action, or default judgment. [Secosky, Griset & McCray, *supra*.]
- *See also* Jason R. Baron, IG and the New Rules: How Do the New FRCP Amendments Affect Info Gov Best Practices, *Legaltech News*, December 7, 2015, <http://www.legaltechnews.com/id=1202744155359/IG-And-The-New-FRCP-Rules?slreturn=20160808104536>, accessed 9/14/16.]



# Other Rules

- Rule 55(c) is amended to make plain the interplay between Rules 54(b), 55(c), and 60(b). A default judgment that does not dispose of all of the claims among all parties is not a final judgment unless the court directs entry of final judgment under Rule 54(b). Until final judgment is entered, Rule 54(b) allows revision of the default judgment at any time. The demanding standards set by Rule 60(b) apply only in seeking relief from a final judgment.
- Rule 84 (abrogated) – Rule 84 was adopted when the Civil Rules were established in 1938 “to indicate, subject to the provisions of these rules, the simplicity and brevity of statement which the rules contemplate.” The purpose of providing illustrations for the rules, although useful when the rules were adopted, has been fulfilled. Accordingly, recognizing that there are many alternative sources for forms, including the website of the Administrative Office of the United States Courts, the websites of many district courts, and local law libraries that contain many commercially published forms, Rule 84 and the Appendix of Forms are no longer necessary and have been abrogated. The abrogation of Rule 84 does not alter existing pleading standards or otherwise change the requirements of Civil Rule 8.

## Other Rules, cont.

- Appendix of forms (abrogated) – Abrogation of Rule 84 and the other official forms requires that former Forms 5 and 6 be directly incorporated into Rule 4. [2015-2016 Federal Rules of Civil Procedure Amendments Released, *Federal Rules of Civil Procedure 2016 Edition*, May 13, 2015, <https://www.federalrulesofcivilprocedure.org/2015-2016-federal-rules-of-civil-procedure-amendments-released/>, accessed 9/14/16.]

# Insights on the 2015 FRCP Amendments

- An excellent explanation of why the Federal Rules of Civil Procedure (FRCP) were amended is provided by BakerHostetler:
  - These changes are in response to increasing costs and delays in federal litigation and are intended to compel clients and litigants to focus on the scope of discovery.
  - Taken together, they require thorough early case assessment and early and frequent discussions with the adversary.
  - Clients who are accustomed to higher fees when a case is in the throes of discovery might now see a bigger blip at the beginning, but the rules, when properly applied, could actually result in a lower discovery spending as the parties work things out instead of engaging in motion practice.
  - The goals of the amendments are to improve case management, to refine the concept of proportionality, to encourage party cooperation, and to provide uniform preservation and spoliation rules across the country.
  - Currently, the case law is quite varied by circuit, and even internally within a circuit. [December 2015 Changes to the Federal Rules of Civil Procedure: A BakerHostetler Q&A, Discovery Advocate, September 9, 2015, <http://www.discoveryadvocate.com/2015/09/09/december-2015-changes-to-the-federal-rules-of-civil-procedure-a-bakerhostetler-qa/>, accessed 9/14/16.]

# Insights on the 2015 FRCP Amendments

- In terms of the issues and challenges that clients will face now that the amendments to the rules are in effect and how lawyers should prepare, BakerHostetler provides the following helpful insights:
  - Both clients and counsel should be prepared to identify which sources of information and witnesses really matter to resolving disputes. We will need to work together to ensure that we are having the right conversations with each other and with our adversaries. Potential issues could arise as clients, counsel, and judges adapt to the new rules. There is ample opportunity for dispute.
  - Besides traditional commercial litigators, others who need to prepare include employment attorneys, patent prosecution attorneys, and bankruptcy attorneys, as the rules changes will affect all of those practices. Attorneys should study not just the additions and deletions to the rules, but also the committee notes, which give context to the changes. [BakerHostetler, *supra*.]

# Competence in E-Discovery: State Bar of California

1. Initially assess e-discovery needs and issues, if any;
2. Implement/cause to implement appropriate ESI (Electronically Stored Information) preservation procedures;
3. Analyze and understand a client's ESI systems and storage;
4. Advise the client on available options for collection and preservation of ESI;
5. Identify custodians of potentially relevant ESI;
6. Engage in competent and meaningful "meet and confer" with opposing counsel concerning an e-discovery plan;
7. Perform data searches;
8. Collect responsive ESI in a manner that preserves the integrity of that ESI; and
9. Produce responsive non-privileged ESI in a recognized and appropriate manner. [Sharon D. Nelson & John W. Simek, Competence in E-Discovery, Sensei Enterprises, Inc., 2016, <https://senseient.com/articles/competence-e-discovery/>, accessed 9/14/16.]

# Proposed Amendments to the FRCP

- Additional amendments to the FRCP have already been proposed.
- Written comments are due by February 15, 2017.
- The proposed amendments concern:
  - Rule 5. Service and Filing Pleadings and Other Papers
  - Rule 23. Class actions
  - Rule 62. Stay of Proceedings to Enforce a Judgment
  - Rule 65.1. Proceedings Against a Surety or Other Security Provider

# Excellent Resources for Electronic Discovery

- David R. Matthews, *Electronically Stored Information: The Complete Guide to Management, Understanding, Acquisition, Storage, Search, and Retrieval*, 2<sup>nd</sup> ed. CRC Press, 2016.
- Website of K&L Gates <http://www.ediscoverylaw.com/> - including a database of more than 2000 cases, access to federal, state, local and specialized court rules, resources, upcoming events and a blog which you can subscribe to.
- Website of Kroll Ontrack <https://www.krollontrack.com/> - including a searchable database of cases (<http://www.ediscovery.com/pulse/case-law/>), publications, press releases and upcoming events.
- Website of Sensei Enterprises, Inc. <https://senseient.com/> - including links to their articles, podcasts, blogs and videos. Subscribe to their article alert service.

# Important Provisions of the Federal Rules of Evidence (FRE)

- FRE 502. Note that FRE 502 specifically addresses the attorney-client privilege and gives protection from inadvertent disclosure, similar to FRCP Rule 26(b)(5). Rule 502(b) allows you to request the return of inadvertently produced privileged or work-product evidence if you took reasonable steps to prevent the error, noticed it quickly and responded promptly. However, it especially points to the need to have a solid e-discovery process, especially at the crucial review step – the last line of defense before the ESI is produced to the opposing party. [Matthews at 17.]
- FRE 901. This rule requires that any evidence that will be admitted into court be authenticated. As you might imagine, electronic evidence presents particular challenges in being able to prove the authenticity of the material (a big problem with social media). This is a scenario where excellent forensics capabilities will be needed. [Matthews at 17-18.]



# Important Provisions of the Federal Rules of Evidence (FRE), cont.

- FRE 802. Called the Hearsay Rule, the author observes that there is a dynamic and ongoing discussion in the courts about how this rule should be applied to electronic evidence. Of course, there are many exceptions to evidence that is claimed as inadmissible due to hearsay. As the author notes on page 19, electronic evidence by its very nature could nearly always be considered hearsay, so there are many cases where that evidence has been challenged and the courts have had to decide whether it is admissible under one of the exceptions to the hearsay rule. [Matthews at 18-19.]
- On page 50, Matthews lists three other federal rules that impact the way that federal jurisdictions treat electronic evidence:
  - Electronic Communications Privacy Act (ECPA) of 1986
  - Stored Communications Act (1986) – part of ECPA – SCA impacts how to obtain social media as evidence
  - *Daubert* ruling – which specifically discusses the criteria for expert witnesses (as well as scientific evidence)

# Amendments to the Federal Rules of Evidence (FRE)

- If approved, would become effective on December 1, 2017.
- Have implications for electronic discovery.
- Rule 803 Exceptions to the Rule Against Hearsay
- Rule 803 currently lists 23 exceptions to the hearsay rule.
- Remove (16) Statements in Ancient Documents

~~A statement in a document that is at least 20 years old and whose authenticity is established.~~

- Rationale: This exception is based on a flawed premise that the contents of a document are reliable merely because a document is old. Abuse of the ancient document exception is possible because unreliable electronic information could be easily accessible and would be admissible under the exception simply because it had been preserved electronically for 20 years. [Jeffrey S. Sutton, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, August 14, 2015.]

# Amendments to the Federal Rules of Evidence (FRE), cont.

- Rule 902. Evidence That Is Self-Authenticating.
- Add (13) Certified Records Generated by an Electronic Process or System

A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902 (11).

- Rationale: Eliminates the expense and inconvenience of a trial witness. Provides a procedure under which the parties can determine in advance whether a real challenge to authenticity will be made and plan accordingly. The opposing party remains free to object to the admissibility of the record on other grounds. [Sutton, *supra*.]

# Amendments to the Federal Rules of Evidence (FRE), cont.

- Rule 902. Evidence That Is Self-Authenticating
- Add (14) Certified Data Copied from an Electronic Device, Storage Medium, or File.

Data copied from an electronic device, storage medium, or file, if authenticated by a process or digital identification, as shown by certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent also must meet the notice requirements of Rule 902(11).

- Rationale: Eliminate the expense and inconvenience of a trial witness. Data copied from electronic devices, storage media, and electronic files are ordinarily authenticated by “hash values.” Thus, identical hash values for the original and copy reliably attest to the fact that they are exact duplicates.

# Part II. Optimizing Discovery: Practical Tips

Sara Anne Hook, M.B.A., J.D.

## Part II. Optimizing Discovery: Practical Tips

A. Early-Stage Planning and Preservation

B. Requests and Responses

C. Production and Review

# Preparing for a Rule 26(f) Conference

- A wealth of helpful information is provided by Castile about how to effectively prepare for a Rule 26(f) conference, especially when electronically stored information (ESI) is involved, which the title of her article suggests it nearly always is. [Amii Castle, Preparing for Your Rule 26(f) Conference: When ESI Is Involved – And Isn't ESI Always Involved? *The Federal Lawyer*, December 2015, pp. 45-49, 55.]
- As she notes in the brief abstract for the article, the amendments to the Federal Rules of Civil Procedure mean that litigators will have even more to do in the early stages of litigation, with the first few months being especially crucial if ESI is involved. [*Id.* at 45.]
- She outlines the follow steps, with practical commentary on what to do during each step:
- Step One: Initial Scheduling Order, including setting a date for a Rule 16 scheduling conference, setting a date of the party's Rule 26(f) conference and setting a date for submission of the parties' planning report. [*Id.* at 45-46.]

# Preparing for a Rule 26(f) Conference, cont.

- Step Two involves talking to the client about relevant documents and data. Key questions to ask are:
  - What evidence is relevant to the litigation?
  - Who are the key players?
  - Where does the relevant evidence reside?
  - What is the relative accessibility of the relevant documents and data?
  - If relevant data is effectively inaccessible, do substantially similar copies of relevant evidence exist?
  - Are preservation and potential production obligations proportional to the needs of the case? [*Id.* at 46-47.]
- As the author notes on page 46, these discussion points will not only help prepare for the Rule 26(f) conference, but they will also simultaneously assist the lawyer in competently instructing the client about its preservation obligations. [*Id.* at 47.]



# Preparing for a Rule 26(f) Conference, cont.

- The author asserts that the location relevant ESI must be discussed with the client at the outset of a case so that the lawyer can determine what ESI should be preserved. [*Id.*]
- She goes on to provide the following advice:
  - “Finally, and a concept not to be ignored, *document* your analysis along the way. Consistently document – in the form of a memo to the file, a written communication to your client or law partner, or some other means – your preservation and production strategies. Clearly documented strategies on what evidence is relevant and proportional, and what evidence is not, will help you if you later have to defend those preservation or production obligations that you instructed your client to undertake.” [*Id.* at 46-47.]

# Preparing for a Rule 26(f) Conference, cont.

- Step Three is the Rule 26(f) conference.
- The author suggests locating any forms that the lawyer's district may provide that will guide the discussions at the conference, such as a form for the planning report. [*Id.* at 47.]
- Among the questions issues to cover in preparation for or during the Rule 26(f) conference are:
  - In person or by phone?
  - Topics
  - Nature and basis of claims and defenses
  - Settlement possibilities
  - Preservation of discoverable information
  - Automatic disclosures
  - Scope and schedule – consider bifurcation
  - ESI, such as forms of production and other ESI issues
  - Privilege issues
  - Changes to presumptive limits
  - Other orders (such as preservation or protective orders)
  - Discovery plan [*Id.* at 47-49.]

# Preparing for a Rule 26(f) Conference, cont.

- Finally, Step Four is the preparation of the parties' planning report.
- The author notes that the contents of the form planning reports offered by various district courts can vary dramatically. [*Id.* at 49.]
- The author goes on to recommend that:
  - No matter the jurisdiction – or the content of the court forms provided – your planning report should set forth the topics you discussed at the Rule 26(f) conference and should include your suggested, and sometimes extensively negotiated, discovery plan. The planning report also should include proposed deadlines for dispositive motions and expert disclosures. Work in tandem with your opposing counsel by exchanging report drafts, reduce your Rule 26(f) conference to writing, then jointly submit the planning report for the court's review prior to the Rule 16 scheduling conference. [*Id.*]

# Problems and Solutions for Electronic Discovery

- A very thorough article about common problems with electronic discovery and suggested solutions is provided by Hernandez. [Andres Hernandez, Common Problems With E-Discovery and Their Solutions, *The Federal Lawyer*, Sept. 2016, pp. 63-68.] Among the issues that he highlights and provides recommendations for are:
  - There's just too much data – try starting with traditional Boolean searches
  - Data is everywhere – and there are many ways to collect it
  - Data collection:
    - self-collection
    - IT collection
    - third-party collection
  - Not all data is created equal – many ways to sift through unstructured data
  - What to do if you know exactly what you are looking for:
    - metadata analysis
    - textual analytics
  - What to do if you are trying to fill in knowledge gaps:
    - importance of using keywords intelligently

# Problems and Solutions for Electronic Discovery, cont.

- What to do if you are still trying to understand your case:
  - use concept-clustering
  - use a word frequency hit count
  - use TAR (Technology-Assisted Review) – almost becoming mandatory?
- Dealing with the expense of the process
  - See his list of vendors offering cost-effective solutions, *infra*.
- Falling into the trap of “scope creep”
- Not starting the e-discovery process early enough
- E-discovery approached as a project
  - the recommendation is to help clients set up better information governance programs (a potential practice-building opportunity for law firms?)
- When your analytics are not good enough

# Problems and Solutions for Electronic Discovery, cont.

- Lack of convergence
- Unwillingness to work cooperatively with opposing parties and their lawyers
- Difficulty recovering the costs of e-discovery
- Laws are complex and constantly changing
- It is almost impossible to compare e-discovery providers
- Technological incompetence – see Rule 1.1 and article by Nelson and Simek, *supra*.
- Data is sorely mismanaged – this often starts with parties themselves

# Requests and Responses

- Consider the sheer volume of potentially relevant ESI that may need to be handled, but also the multiplicity of types of and sources of ESI.
- Using K&L Gates and Kroll Ontrack databases, try to find case summaries for each type and source of ESI.
- As a new type or source of ESI presents itself, read everything you can about it.
- If you really want to understand each type of electronic evidence, how it is generated, by which software and devices, how to retrieve it and preserve it and how to uncover evidence that has been hidden or tampered with, please read *Electronically Stored Information: The Complete Guide to Management, Understanding, Acquisition, Storage, Search, and Retrieval*, 2<sup>nd</sup> ed., by Matthews, *supra*.
  - I use it as one of my textbooks in the semester-long course I teach on electronic discovery, which is part of the legal informatics certificate offered by the Indiana University School of Informatics and Computing at IUPUI.
  - You will enjoy the history of how each new technology developed, from analog to digital, the electronic discovery implications of this technology and the clear explanations for how computing programming works, down to the zeros and ones of binary computer code.

# Requests and Responses, cont.

- Here are some potential types of ESI that might be requested, nearly all of it discoverable and admissible, absent other doctrine/rules to the contrary:
  - Facebook, Twitter, LinkedIn and Tumblr
  - Emails (Work-Related and Personal) – even more complicated in the world of BYOD (Bring Your Own Device)
  - Video Surveillance (Private and Public)
  - Computerized Versions of Contacts and Other Documents
  - Text Messages and Voicemail
  - Chats and Instant Messages
  - YouTube and Vine
  - Instagram, Pinterest, Snapchat and WhatsApp
  - Wearable Devices and the Internet of Things



# Requests and Responses, cont.

- Beaver and colleagues offer a number of helpful recommendations for the discovery of social media evidence, but which are applicable to nearly every kind of ESI. [Gary L. Beaver, Steven Brower, Amy Longo, Cecil A. Lynn, III, & Mark Romance, *Social Media Evidence – How to Find It and How to Use It*, ABA Annual Meeting, Aug. 8-12, 2013, at 20-21.]
  - Discovery requests/subpoenas for social media evidence should be drawn narrowly. (This is especially important given the 2015 amendments to the Federal Rules of Civil Procedure.)
  - Tie your discovery requests to information already in hand that shows that the request is seeking evidence that likely exists and, therefore, is not a fishing expedition.
  - Compulsion efforts are better targeted at the users of social media, not at the social media providers.
  - If you have evidence that the producing party has improperly withheld evidence, go to the court for sanctions and/or for more social media discovery.
  - Consider closely who “owns” the social media link. You may have more than one potential discovery target.
  - *In camera* review by the court may be needed.
  - If the request is too broad, the court may limit it or deny it altogether. (Be sure to review the 2015 amendments to the Federal Rules of Civil Procedure.) [*Id.* at 15-19.]

# Requests and Responses, cont.

- Many clients – and even their lawyers – would be shocked to learn about all of the ways that potentially relevant evidence is being generated by daily activities and use of devices, often without being aware of it.
- The Internet of Things, such as wearable devices and Smarthouse technology, is going to provide a rich repository of information about people's whereabouts and habits.
- For example, a recent article in *The Indiana Lawyer* indicates that data from fitness trackers is already being requested in civil and criminal cases. [See Marilyn Odehdahl, *Fitness Trackers Add to Flood of Digital Evidence in Court*, *The Indiana Lawyer*, Aug. 10, 2016.]
- Social media is perhaps one of the most fruitful kind of evidence to pursue, because of its spontaneity, its informality, its near permanence, and how easy it is to gather. Moreover, most courts have said that what is posted on social media is nearly always discoverable and admissible.
- However, newer forms of social media and mobile messaging systems are being designed to specifically avoid later discoverability. [See Cori Faklaris & Sara Anne Hook, *Oh, Snap! The State of Electronic Discovery Amid the Rise of Snapchat, WhatsApp, Kik, and Other Mobile Messaging Apps*, *The Federal Lawyer*, May 2016, pp. 64-75.]

# Remember the Metadata!

- Simply put, metadata is “data about data.”
- Unless otherwise specified, all ESI should be requested and produced in native format with metadata intact, which allows for the most robust review and analysis.
- The duty to preserve includes the metadata associated with all files.
- It is important to note that metadata is generated automatically by common software programs, often without the user even being aware of it.
- Such potentially relevant information as the document’s author, date of creation, date of revisions, time spent on the document, etc. are easily determined without fancy digital forensics capabilities.
- Using features such as Track Changes may also reveal information that should be kept confidential.
- For example, by using the Info selection in Word, I can already see the following information about an early version of a chapter for a seminar manual that I was preparing earlier in the week.



## Info

## Legal Ethics and ESI - Hook

LAW ENFORCEMENT - Social Media Evidence - October 2016



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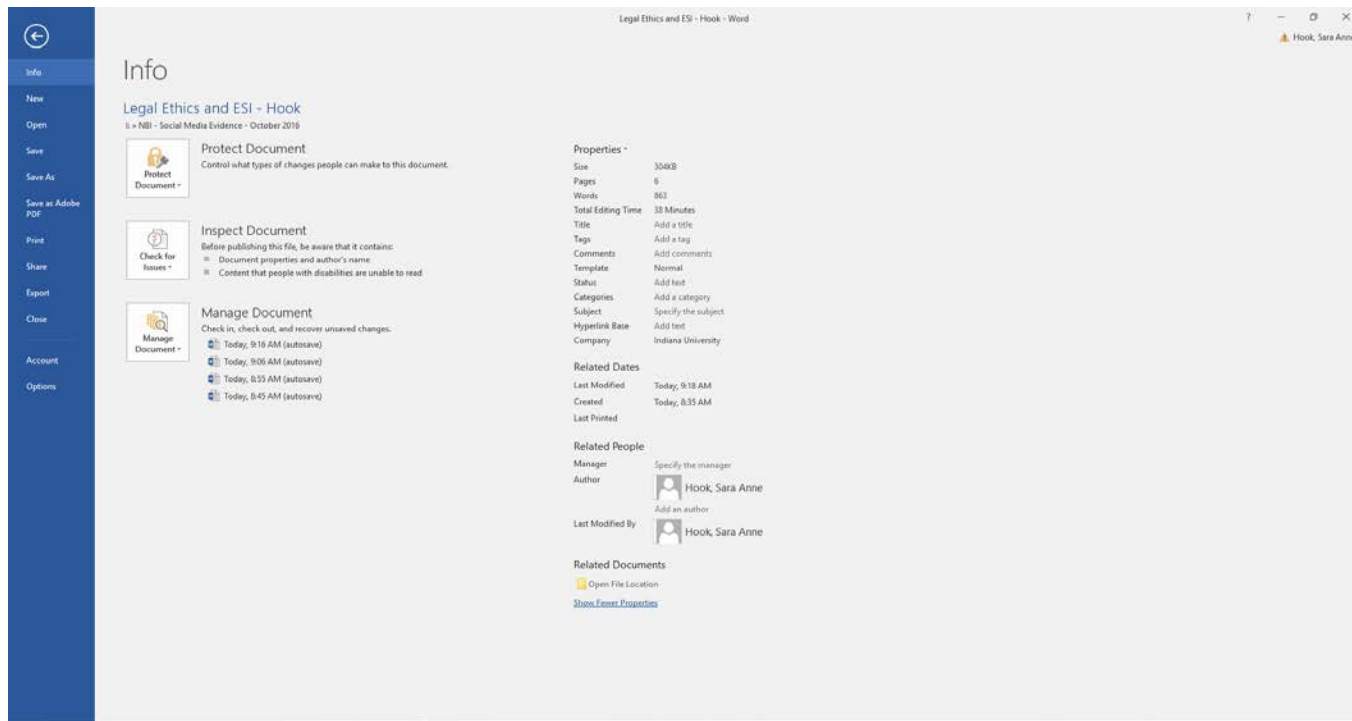
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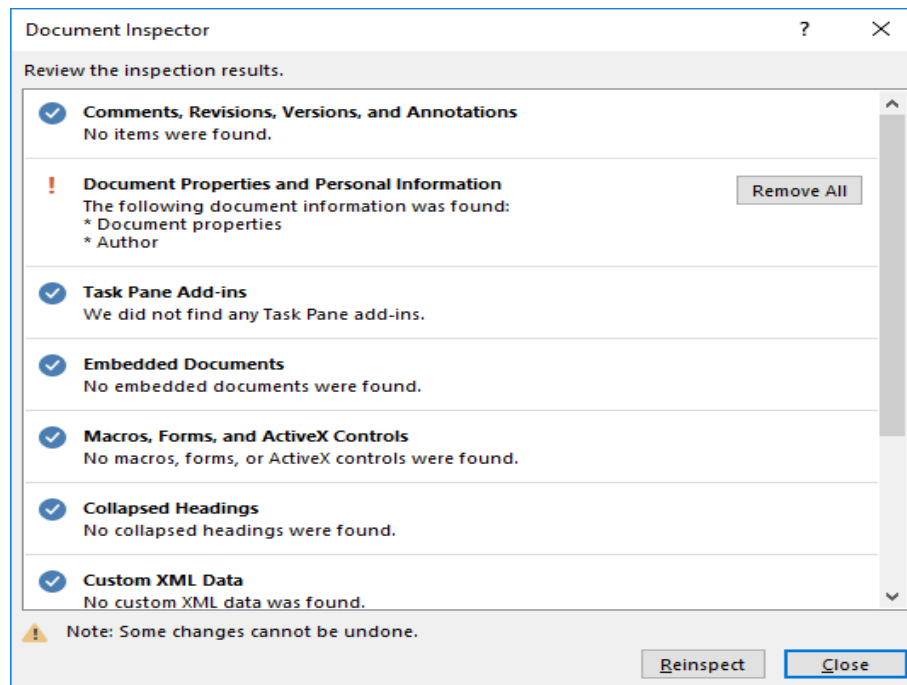
# Remember the Metadata, cont.

- I can easily obtain additional information by selecting Show All Properties, found at the bottom right of the screen.



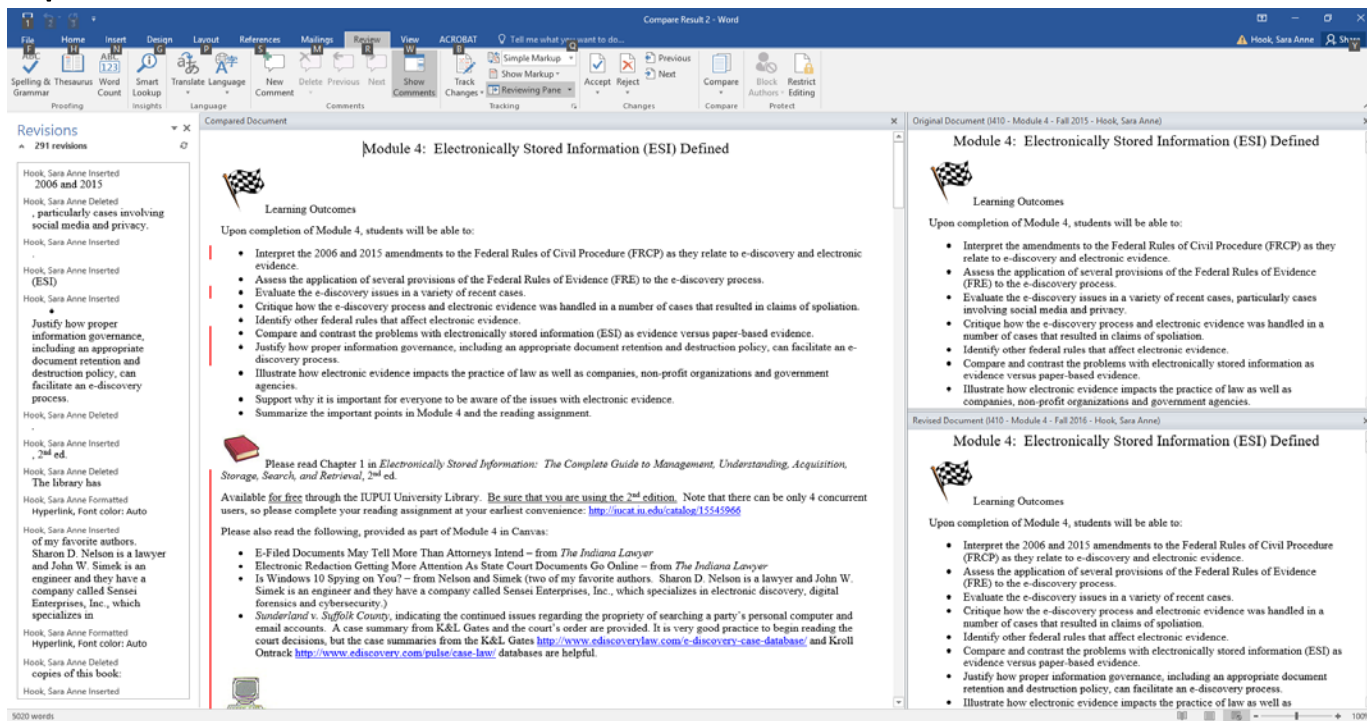
# Remember the Metadata, cont.

- Then the Inspect Document tool may provide even more information that might be potentially relevant.



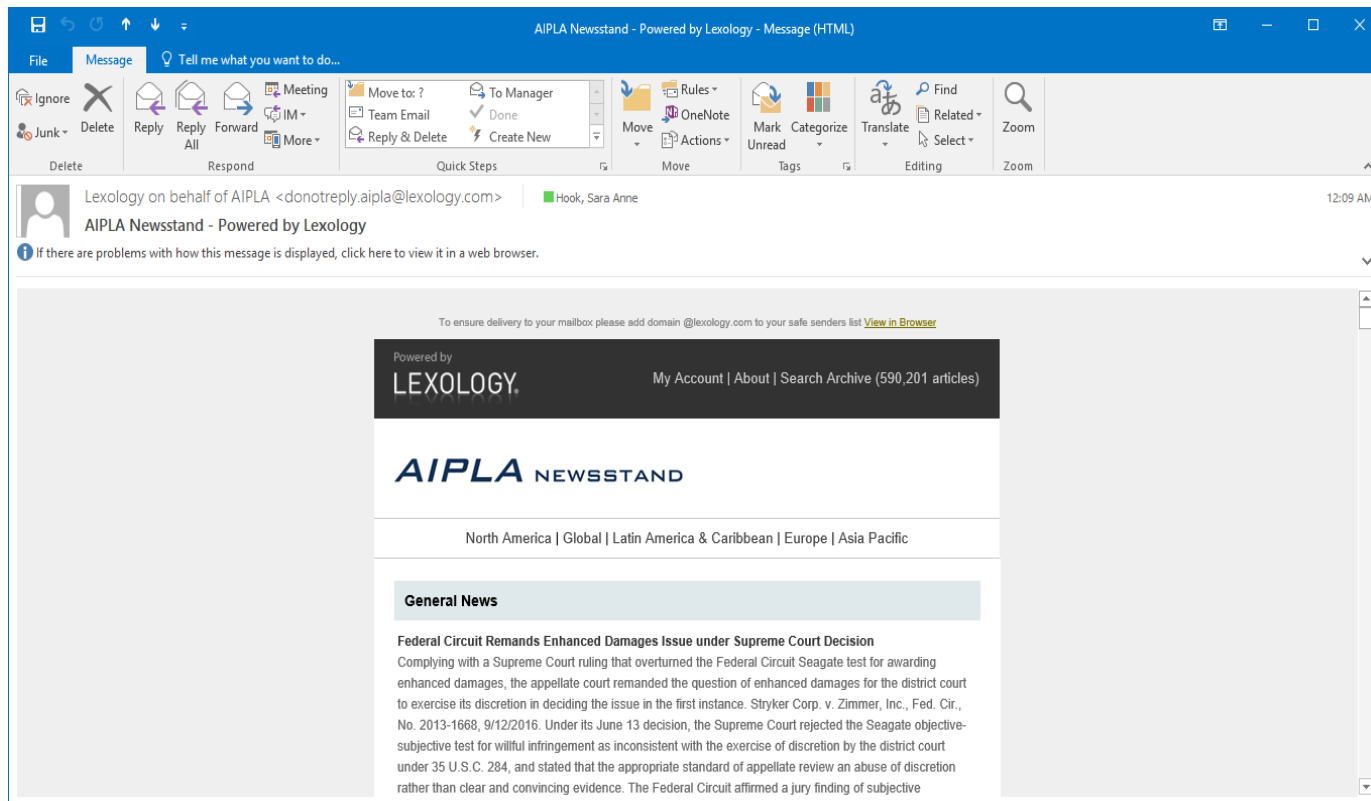
# Remember the Metadata, cont.

- In addition to Track Changes, it is very easy to compare various versions of a document side-by-side, including in Word using its Compare feature.



# Remember the Metadata, cont.

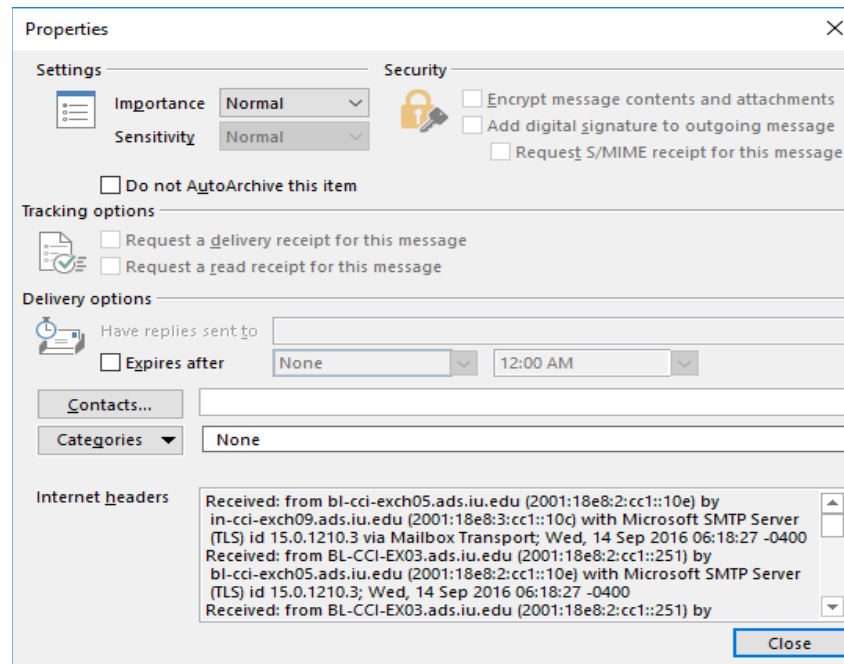
- An email message.





# Remember the Metadata, cont.

- And its Properties.



The screenshot shows the 'Properties' dialog box for an email. It is divided into several sections:

- Settings:** Includes 'Importance' (Normal) and 'Sensitivity' (Normal) dropdown menus. There is a checkbox for 'Do not AutoArchive this item'.
- Security:** Includes checkboxes for 'Encrypt message contents and attachments', 'Add digital signature to outgoing message', and 'Request S/MIME receipt for this message'.
- Tracking options:** Includes checkboxes for 'Request a delivery receipt for this message' and 'Request a read receipt for this message'.
- Delivery options:** Includes a 'Have replies sent to' field and an 'Expires after' dropdown set to 'None'.
- Contacts...** and **Categories** (set to 'None').
- Internet headers:** A text area showing the following headers:

```
Received: from bl-cci-exch05.ads.iu.edu (2001:18e8:2:cc1::10e) by
in-cci-exch09.ads.iu.edu (2001:18e8:3:cc1::10c) with Microsoft SMTP Server
(TLS) id 15.0.1210.3 via Mailbox Transport; Wed, 14 Sep 2016 06:18:27 -0400
Received: from BL-CCI-EX03.ads.iu.edu (2001:18e8:2:cc1::251) by
bl-cci-exch05.ads.iu.edu (2001:18e8:2:cc1::10e) with Microsoft SMTP Server
(TLS) id 15.0.1210.3; Wed, 14 Sep 2016 06:18:27 -0400
Received: from BL-CCI-EX03.ads.iu.edu (2001:18e8:2:cc1::251) by
```

A 'Close' button is located at the bottom right of the dialog.

# Consider What Tools and Expertise Are Available

- Digital forensics professionals, such as Sensei Enterprises, Inc. - <https://senseient.com/services/digital-forensics/>
- Electronic discovery vendors. For example, Olson and O'Connor list the following options for small cases. [Bruce A. Olson and Tom O'Connor, *Electronic Discovery for Small Cases: Managing Digital Evidence and ESI*, ABA, 2012.]
  - SafeCopy, Harvester and SharePoint Collector – Pinpoint Labs, <http://pinpointlabs.com/>
  - Quick View Plus – Avastar, <http://www.avantstar.com/quick-view-plus-standard-edition#fndtn-overview>
  - dtSearch Desktop and dtSearch Publish – dtSearch, <http://dtsearch.com/>
  - Digital WarRoom Pro – Digital WarRoom, <http://www.digitalwarroom.com/products/digital-warroom-pro/>
  - Intella – Vound, <https://www.vound-software.com/>
  - Lexbe Online – Lexbe, <http://www.lexbe.com/>
  - Nextpoint Discovery Cloud and Trial Cloud – Nextpoint, <http://www.nextpoint.com/>

# Consider What Tools and Expertise Are Available

- In addition to the vendors listed by Olson and O'Connor, Hernandez also recommends: [Hernandez, *supra*.]
  - Acrobat Legal Edition – [www.adobe.com](http://www.adobe.com)
  - CasePoint – [www.legaldiscoveryllc.com](http://www.legaldiscoveryllc.com)
  - Cicayda – [www.cicayda.com](http://www.cicayda.com)
  - CloudNine – [www.cloudninediscovery.com](http://www.cloudninediscovery.com)
  - CS Disco – [www.csdisco.com](http://www.csdisco.com)
  - Logikcull – [www.logikcull.com](http://www.logikcull.com)
  - Z-Discovery – [www.zapproved.com](http://www.zapproved.com)
  - Wind – [www.windlegal.com](http://www.windlegal.com)

# Production and Review

- In the specified formats with metadata intact.
- In some ways, the review step is the most risky.
- Review step is the last line of defense before production.
- Danger of waiving the attorney-client privilege, attorney work-product or other confidentiality doctrine.
- Real, live human review is best.
- Know jurisdiction's rules about waiver.
- Negotiate claw-back agreement as part of "meet and confer" conference.
- Reduced time periods for e-discovery process under 2015 amendments to the FRCP add to the risks.
- Technology-Assisted Review (TAR) tools are getting better.
- As indicated by, Secosky, Griset & McCray, the scheduling order may include Federal Rule of Evidence 502 agreements, which further the Courts' encouragement of non-waiver and claw-back agreements to facilitate discovery. [Secosky, Griset & McCray, *supra*.]

# Part III. Evidence Handling and Storage: How to Prevent Spoliation

Sara Anne Hook, M.B.A., J.D.

# Helpful to Review the 2015 Amendments to the FRCP

- As explained by Secosky, Griset and McCray, “[c]hanges to Rule 37, pertaining to the preservation or loss of electronically-stored information, are also significant.
- First, Rule 37(e) adopts a common law principle that a duty to preserve arises when litigation is “reasonably anticipated.”
- Because of this duty, it is extremely important for every organization to have measures in place to quickly and accurately identify those events that could lead to litigation, and to preserve all electronic information related to those events. [Jones, *supra*.]
- Second, consequences for failing to preserve data are also better defined in the new Rules. Rule 37(e)(1) provides that the court, “upon finding **prejudice** to another party from loss of the information, may order measures **no greater than necessary to cure the prejudice.**” [Secosky, Griset & McCray, *supra*.]

## 2015 Amendments, cont.

- Under the new Rule, more serious sanctions for loss of ESI are only appropriate where the court finds a party intended to deprive the other party's use of the ESI in litigation.
- Only upon a finding of intent can the court impose sanctions of an adverse inference jury instruction, dismissal of the action, or default judgment. [Secosky, Griset & McCray, *supra*.]
- *See also* Jason R. Baron, IG and the New Rules: How Do the New FRCP Amendments Affect Info Gov Best Practices, *Legaltech News*, December 7, 2015, <http://www.legaltechnews.com/id=1202744155359/IG-And-The-New-FRCP-Rules?slreturn=20160808104536>, accessed 9/14/16.]

# Spoliation under FRCP Amended Rule 37

- A search of the K&L Gates and Kroll Ontrack databases reveals a number of interesting cases from the first half of 2016 that deal with email as one form of potentially relevant ESI.
- These cases specifically consider spoliation and sanctions and illustrate how courts have been applying the recently amended FRCP Rule 37(e).
- Among these cases are:
  - *Fiteq Inc. v. Venture Corporation*, 2016 WL 1701794 (N.D. Cal. Apr. 28, 2016).
  - *Matthew Enterprise, Inc. v. Chrysler Group, LLC*, 2016 WL 2957133 (N.D. Cal. May 23, 2016).
  - *CAT3, LLC v. Black Lineage, Inc.*, 2016 WL 154116 (S.D.N.Y. Jan. 12, 2016); *CAT3, LLC v. Black Lineage, Inc.*, No. 14 Civ. 5511 (S.D.N.Y. Apr. 4, 2016).]
  - *Nuvasive, Inc. v. Madsen Medical, Inc.*, 2015 WL 4479147 (S.D. Cal. July 22, 2015); *Nuvasive, Inc. v. Madsen Medical, Inc.*, 2016 WL 305096 (S.D. Cal. Jan. 26, 2016).
  - *Brown Jordan Int'l v. Carmicle*, 2016 WL 815827 (S.D. Fla. Mar. 2, 2016).



# Avoiding Spoliation

- Start with good information governance - this is a service that law firms can provide to their clients and will facilitate the electronic discovery process.
- Work with clients to develop document retention and destruction plans and procedures and verify that they are being used.
- See the EDRM and note that Information Governance is at the far left side and is the first step in electronic discovery.
- Issue robust and detailed preservation orders as soon as litigation is reasonably anticipated.
- Make sure that all parties, data custodians, managers, supervisors, etc. receive preservation orders. This could include cloud computing vendors, third-party contractors and consultants, etc.
- Understand the client's IT processes, procedures, systems and devices.
- Be sure to consider the personal devices and systems that employees may be using.

# Important to Note That Spoliation is Not the Only Basis for Sanctions

- Lawyers must understand and be able to apply the 2015 amendments.
- Sanctions are already being imposed for failures to follow the 2015 amendments.
- For example, *Fulton v. Livingston Fin., LLC*, No. C15-0574JLR, 2016 WL 3976558 (W.D. Wash. July 25, 2016).
  - In this opinion, the court imposed sanctions for counsel's misrepresentations of law and fact, including his citation to case law analyzing outdated standards under Fed. R. Civ. P. 26(b)(1), which was substantially affected by the December 2015 amendments. Calling counsel's reliance on case law applying outdated standards "inexplicable" and "inexcusable" where the "December 1, 2015 amendments to Federal Rule of Civil Procedure 26(b)(1) 'dramatically changed' what information is discoverable," the court ultimately imposed monetary sanctions (payment of Plaintiff's fees and costs for defending the at-issue motion) and ordered counsel to supply "senior members" of his firm with the "offending brief" with the explanation that "the court is entering sanctions . . . for quoting provisions of the civil rules that are badly out of date, and also making direct misrepresentations to the court." [K&L Gates website.]



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